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Gregory A. Hicks

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Opportunity in the Face of Danger: The Pragmatic Development of Habitat Conservation Plans

*Keynote Speech by Donald J. Barry**

West-Northwest Symposium, March 1, 1997

I was reflecting this morning at breakfast that it's sort of a traditional rule of thumb for speakers that you're supposed to say witty and engaging things in the first few moments of your address in order to captivate your audience and get them to like you. I decided to be a little contrarian this morning and confess my past sins.

I have probably done things over my last 22 years during my legal career on endangered species matters that has irritated virtually every one of you in this audience at some particular moment. In 1975, I helped draft the definition of "harm" that went to the Supreme Court in the *Sweet Home* case, so for those of you who represent developers, you can blame me. In 1982 I helped negotiate the first habitat conservation plan [HCP] with Lindell Marsh, so, for those of you who love habitat the way it is and are not too thrilled about HCP's, again, you can help blame me. And then lastly, in 1994, I came full circle in having helped build the regulatory equivalent of the atom bomb with the definition of "harm," and drafted Secretary Babbitt's "no surprises" policy, which, in the views of many people in the environmental community, sort of gives everything away. With that particular perspective, in the last 22 years, I sort of view myself as the "Forrest Gump" of the Endangered Species Act. I seem to have been in many places at different times and have been sort of interjected at fairly key moments in the evolution of the statute. It's already been noted that it's appropriate to return to San Francisco for this type of symposium because this was the birthplace of the first HCP at San Bruno Mountain. And, depending on your overall views on HCP's, as to whether they're a good thing or a bad thing, this is either returning to the scene of the crime or returning to the birthplace of one of the most interesting and important developments in federal environmental law.

Let me just sort of show my cards and my choice between those two alternatives. I think, without exception, the concept of Habitat Conservation Planning, and by extension, the NCCP [Natural Community Conservation Planning] process here in California, is probably the most important development for endangered species conservation since the passage of the original act. I think, within the endangered species arena, probably the only

* Donald J. Barry is the Deputy Assistant Secretary for Fish and Wildlife and Parks at the U.S. Fish and Wildlife Service. Mr. Barry has helped draft every major regulation implementing the Endangered Species Act, including Section 7 consultation regulations, and has been involved in every ESA reauthorization debate since passage of the original act.

other thing of comparable importance for endangered species conservation is the requirement of mandatory consultation with federal agencies under Section 7. So in the arena of Section 9 effects on "take" and private property, I think habitat conservation planning is one of the most interesting and unexpected and unique developments that's happened since the original act was enacted.

Now, if HCP's are the number one development since the passage of the original act, Secretary Babbitt's "no surprises" policy has probably been the single most important catalyst in stimulating renewed interest in Habitat Conservation Planning as a way of reconciling development interests with endangered species conservation. Many of you have heard the numbers before. In the first ten years of the HCP program, only 14 permits were issued. That was a rate of about one and a half permits per year. Since Secretary Babbitt arrived at the Interior Department, in the first three years of his rein, we issued approximately 130 HCP permits, almost a 30 fold increase in the rate with which they are being negotiated and approved. So clearly something significant has happened in the last two or three years which has generated renewed interest in Habitat Conservation Planning.

It's somewhat easy to lose your perspective on how fast and how far we've come in the whole area of endangered species conservation as it relates to private property. I think what I'd like to do right now is to sort of help keep the brain cells flowing since some of you may be getting a little tired. I'd like to engage the audience in a little interactive participation. I'd like you all to take out a piece of paper and a pen, and I'd like you to write down your current age. Now what I'd like you to do is to subtract from your age the number 22 and circle the result. And then, just to see how nimble we all are, I'd like you to add the number 7 to the number in the circle and circle the second number.

Now what do these numbers represent? Twenty-two years ago I wrote my first legal opinion for the Fish and Wildlife Service, interpreting the Endangered Species Act and what it meant. And I have frequently thought back on what my views were back in 1975 about endangered species conservation. And at the time, in 1975, we were just finishing up the regulations implementing the Endangered Species Act for the first time, and that's when the definition of "harm" came out. I know my views at that point were considerably different than they are today, with regards to endangered species conservation and the question of private property. I just wanted people in the audience today to reflect back on that first number that you circled, which was your age at the time of 1975, and to think back just for a moment about what your views were on endangered species conservation, if you had any at all at that particular point, and how they've changed by what your thinking is today. And again, I think it gives you a perspective in terms of how far we've all changed and how far we have all moved in viewing something as complicated as endangered species conservation that affects private property rights.

The second number that I asked you to circle was your age in 1982, when the San Bruno HCP was first negotiated. Again, I'd like to ask you just as an audience, to compare and contrast your views on endangered species conservation in 1982 with what they are today, and what they may have been in 1975. And again, it gives you a continuum and a perspective on how far

things have changed, how fast things have moved, and how perhaps our thinking is all different today than it was way back when.

It's obvious that not everyone is as enamored with the Habitat Conservation Planning process and the NCCP process as Secretary Babbitt is, and he is a huge fan and champion of the process. I think, in many respects, one's views and assumptions about HCP's and whether they're a good idea or a bad idea are directly related to your assumptions about the effectiveness of section 9 overall in protecting endangered and threatened species habitat. If, in your view, section 9 has been a very effective bulwark in stopping the loss of critical habitat for endangered species over the past 20 years, then HCP's don't look like such a hot idea, and you begin to become concerned that all they do is result in the loss and further erosion of additional habitat. If, on the other hand, you believe that section 9 has been somewhat of a well-intentioned but somewhat of a porous, ineffective sieve in preventing the loss of endangered species on private lands, then perhaps maybe Habitat Conservation Planning looks like a significant improvement, by at least requiring the consideration of offsetting mitigation and compensation for the listed species as development takes place.

You've all heard the old cliché that where you stand on a given issue is directly related to where you sit. And so I think, in the context of section 9 and Habitat Conservation Planning, frequently people's views on habitat conservation planning as a good idea or a bad idea is directly related to your views on how effective things have been without the HCP process, and whether or not endangered and threatened species have been well served by the effects of section 9.

Now, my own personal vote is somewhere in between. You can probably count on two hands the number of prosecutions, either civilly or criminally, that have been brought by the federal government over the last 23 years because of an alleged take on private lands. So to that extent, it's not been a readily and frequently utilized tool. And in fact, we've had the loss of thousands and thousands of acres of endangered and threatened species habitat in the interim. On the other hand, I think it's fair to say that the mere threat of a section 9 prosecution is a very intimidating thing. And so even though the cases themselves have not been brought, just the mere existence of that threat and the fact that there's a citizen suit provision, which can allow third parties to enjoin the Secretary to try and force him to enforce section 9, has been a very intimidating feature of the act, and it's one reason why perhaps it's had an effect above and beyond just the number of cases that have actually been brought.

Now, I was reminded personally of these diverging perspectives on the HCP process a couple of weeks ago, when I met back in Washington D.C. with some staunch environmental critics of the HCP process. It was a really interesting and enjoyable discussion with them over an hour's period of time. One person sort of summarized her views on HCP's by saying that every one of them had been bankrupt, not a single one of them had worked, and particularly attacked the San Bruno HCP as the worst example of failed promises. And I had this crooked smile come across my face and she stopped and she said, "What are you smiling about?" And I said, "Well, you probably don't know this about my background, but I helped

negotiate that HCP, and quite frankly, from my perspective, that was a pretty good deal. At the time, I was chief counsel for the Fish and Wildlife Service, a career employee at Interior. Jim Watt was my Secretary, and Wild Bill Coldiron was my Solicitor." Mr. Coldiron, for those of you who don't know much about his background, confided in me one time (he'd been the general counsel for Montana Power) that he had terminated his 30 year membership with Ducks Unlimited because they'd become too radical environmentally. And at this particular point, I had to go and persuade Solicitor Coldiron that it was worth my time to negotiate a deal involving a butterfly and a billion dollar real estate development project. In the case of San Bruno, we ended up setting aside 87% of the butterfly's habitat and set up a trust fund indexed to inflation for the butterfly.

So I said to this woman sitting in my office, "By my yardstick, given the fact that this was Jim Watt, and I had Solicitor Coldiron, and I got a trust fund indexed to inflation for an insect, and set aside 87% of its habitat, that looked like a pretty good deal." But from her perspective, it was a terrible idea and I think it's just one of those examples where people can reach different conclusions where they're working from the same set of facts.

What have been some of the catalysts for such evolutionary changes in the status of HCP's from sort of a backwater unworkable tool to a groundbreaking front line idea? Interestingly enough, I think one of the major events was the convergence of two completely opposite and contrasting political forces: The arrival of Secretary Babbitt at Interior, with his very intense interest and knowledge of the Endangered Species Act, and the 1994 Republican congressional revolution, when we flipped from a George Miller in charge of the Natural Resources committee to Chairman Don Young from Alaska, and the across the board assault on our federal environmental laws, which seemed to be at the forefront of the congressional revolution in 1994.

A couple of days after the election, Secretary Babbitt met with those of us who were political appointees at the time, and we were all sort of interested to measure his mood after the election. And he was surprisingly upbeat. And he basically noted that the Chinese ideogram for danger is also the ideogram meaning opportunity. And from his perspective, we should look for the opportunities that the congressional losses had just created and try to use them to our own advantage. And I have to tell you, most of us were sort of appalled at this rampant optimism on his part. But his aggressive optimism sort of brought to mind this famous quote from General Ferdinand Foch from the Second Battle of the Marne, who cabled back from the front, "My center is giving way, my right wing retreats, situation is excellent, I am attacking." And in the face of overwhelming defeat up on the Hill, Secretary Babbitt's decision was to attack.

So, out of the ashes of our political defeat came his resolve to save the Endangered Species Act by implementing a series of reforms on the implementation of the act from top to bottom, particularly as it applied to private lands. The result has been a flurry of new reforms and incentive-based strategies to try and reconcile endangered species conservation with economic

development, and particularly to stimulate property owners' interests in endangered species conservation. The litany is sort of a "soup to nuts," each one of these has had sort of its own little tag. We've had the "no surprises" policy, the "safe harbor" policy, Canada conservation agreements, multi-species HCP's, and expansion and acceleration of Secretary Babbitt's support for California's NCCP initiative, we've had a very special target initiative involving industrial timberlands in the Pacific Northwest, where we set up a special HCP "SWAT team" that does nothing but HCP's with large landowners, the list goes on and on.

In 1995 and 1996, many of the private property rights advocates and opponents of the ESA thought that the time was at hand and dismissed these administrative reforms as sort of window dressing and fairly shallow distractions. These folks basically put all of their anti-ESA eggs in two quick-fix baskets. One was the Supreme Court, which was going to be considering the *Sweet Home* case and the definition of "harm." The other one was a series, at least on the congressional front, of a D.C. sized phone book, of anti-ESA bills that attacked the ESA from soup to nuts. I used to travel around the country, literally with a copy of the D.C. phone book with me, and I'd say, "This is a copy of the D.C. phone book. And this is the Young-Pombo Bill. It's the size of the D.C. phone book, and the D.C. phone book is better organized." But these bills kept coming out. They were introduced in the Senate. Senator Slade Gorton introduced a bill that was about that thick. Senator Kempthorne had the Young-Pombo bill, and things really looked fairly bleak from the perspective of an endangered species advocate.

The poisonous atmosphere and the vitriolic attack on the Endangered Species Act in these bills reminded me of a quote from the late, cynical commentator H.L. Mencken, who once wrote that "[t]he whole aim of practical politics is to keep the populace alarmed, and hence clamorous to be led to safety, by menacing it with an endless series of hobgoblins, all of them imaginary." Now, it would be certainly inaccurate to suggest that every problem under the Endangered Species Act that's been identified today is imaginary. They certainly have not been imaginary, they have been real. But it's equally inaccurate to assert that the ESA is so fundamentally flawed that the only way it could possibly be salvaged is through the use of meat-axe and chain-saw type of legislative surgery, and that you required bills the size of D.C. phone books to solve the problems.

As we all know, the quick fix strategy from the opponents' point of view of the ESA eventually crashed and burned. A Republican-packed Supreme Court voted 6-3 in the *Sweet Home* case that we had not abused our authority in 1975 when we came up with a regulatory definition of harm, and that, thank you very much, it could stay on the books. And as we also have noted, the anti-ESA bills that have been introduced in Congress ended up going nowhere. None of the bills were reported out of the Senate Environment Public Works Committee and even though Congressmen Young and Pombo were able to pass a bill out of their committee, even objective observers noted that it was such an over-the-top legislative effort, that even Newt Gingrich was not prepared to bring it to the floor of the House and kept it under lock and key.

Now with the Republicans retaining control of Congress in the last election, you would normally expect a repeat of last year's ESA circus. But I have to tell you

that there are signs of dangerous outbreaks of common sense and pragmatism permeating this year's legislative debate on the ESA. Let me just give you a few examples. Senators Kempthorne and Chafee have circulated a draft of an ESA bill which is a dramatic departure from Senator Kempthorne's bill in the previous Congress. While there are parts in this draft that are very troublesome to the Department of the Interior, an objective commentator would have to admit that this is a very serious legislative proposal that deserves very serious attention. The fact that Senator Chafee, who has probably the strongest environmental record of any Republican Senator, is on this draft with Senator Kempthorne, and given the fact that the Republicans have 55 members in the United States Senate, nobody will be to Chafee's left on this environmental issue, suggests that this bill has got tremendous momentum. And there are at least 10 to 12 conservative Democrats who are likely to be attracted to various features of it. So there is a decent chance, if the Kempthorne-Chafee coalition holds together, that a bill could come out of the Senate like a hot knife through butter.

So it's definitely something that is worth watching very closely. Interestingly enough, the Kempthorne-Chafee bill has a number of propositions in it attempting to ratify in various ways various administration ESA reforms, including HCP's, the "no surprises" policy, and various other private landowner incentive packages.

Another interesting development which demonstrates a shift in tactics from the previous congress is that the primary anti-ESA coalition has begun to signal its desire to push for a less ambitious agenda than D.C.-sized phone books. In particular, they are appearing to generally support the Senator Kempthorne-Chafee draft, and are now beginning to focus more on the question of incentives, as opposed to compensation, which is a huge change in their strategy. I think they have increasingly become convinced that takings legislation is a loser, as much as they love it, and their members love it, that it would never be signed by this president, and that from that perspective, they need to change their focus.

On the House side, it's been interesting to watch a lessening of the temperatures of the ESA debate. Chairman Young, of the House Resources Committee, has little desire at this point to move out smartly with another ESA bill and instead he's quite content to sit back and see what happens with the United States Senate. And while the environmental community remains somewhat split into two different camps regarding their comfort and enthusiasm for HCP's and the administration's HCP based reforms, the community as a group is increasingly focusing their attention on making sure that HCP's work both for landowners and the affected covered species. And they're now asking what I think are a series of very fair questions. If a deal is truly supposed to be a deal, under no surprises, how do we measure the minimal biological adequacy or standard to be required in such a deal? What level of biological monitoring is appropriate? What's the role of adaptive management? And what permanent funding sources should be established to ensure that in emergency situations there's a means to supplement the level of mitigation required by an HCP permittee?

Quite frankly, I know believe that the level of discussion and debate on HCP's and the NCCP process in Washington, D.C. is one of the healthiest and most

encouraging developments in the endangered species arena today. I believe we're now asking the right set of questions. And we're basically focusing from each side's vantage point on the right set of issues. From the regulated community's perspective, it's the need for incentives and regulatory certainty. From the environmental community's perspective, it's the need for biological clarity of the standards for approval of HCP's and the questions of enhanced monitoring of adaptive management and the need for secured funding sources to deal with unexpected contingencies in the long term mitigation arena. And from the federal and state regulatory agency perspective, it's the need for collaborative stewardship and the need to try to blend together our regulatory programs, so from a landowner's perspective you don't have this conflicting and often different regulatory requirements that just leave you exhausted and unable to move.

The symposium today, I think focuses on HCP's and the NCCP programs as pragmatic solutions to regulatory conflicts. I think in retrospect, when you really stop to think about it, there's a deeper meaning to the HCP and NCCP programs that go way beyond the rhetoric and the political battles which have surrounded them. As I was thinking about this symposium, I began to conclude that this is not really a debate about endangered species conservation at all. It's an overdue debate about the quality of human life, about the disappearance of rare habitats, and the preservation of open spaces for generations to come. It's a debate that reminds me of a part of John F. Kennedy's inaugural address, when he said, "I am certain after the dust of centuries has passed over our cities, we too will be remembered not for victories or defeats in battles or in politics, but for our contribution to the human spirit."

During the course of today's discussions, I would urge symposium participants in discussing these issues with each other, to be mindful of the admonition of Judge Learned Hand, who once wrote, "The spirit of liberty is a spirit that is not too sure it is right." Or, when put in the context of a debate on the appropriate level of environmental protection and regulation: I shared a podium a year ago with Vermont's Attorney General Geoffrey Amstoy, who is so popular in that state that both the Republicans and Democrats have repeatedly tried to nominate him to run as Attorney General [of the United States]. And Attorney General Amstoy in his speech about the appropriate balance between environmental regulation and property rights reformulated Judge Learned Hand's advice that "The spirit of liberty is jeopardized by too much certitude, by too much righteousness, and by an unwillingness or incapacity to stand in another's shoes." "We must try harder to understand than to explain," said Vaclav Havel. So at the risk of sounding a bit like Lindell Marsh, I would like to close by suggesting that the discussion today really has less to do with politics and has much more to do with values. Winston Churchill once wrote that "[t]he defining issue in great public policy debates is whether the root of the matter is within the people." And so it is with our discussions today. Is the root of the matter for endangered species conservation within the heart of the American people? Public opinion polls on the Endangered Species Act strongly suggest that it is. This is critical to know for setting the balance for ultimately the durability of endangered species protection lies not in the letter of the law, but in the language of the heart. Thank you very much.